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Lim Guan Eng v Public Prosecutor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS
P-06A-7-03 OF 2017 AND P-05-121-03 OF 2017
UMI KALTHUM, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI
JJCA
28 NOVEMBER 2017

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Constitutional Law — Fundamental liberties — Personal liberty — Criminal charges — Prosecution requested accused persons to comply with s 62 of the Malaysian Anti-Corruption Commission Act 2009 — Whether s 62 constitutional — Whether infringed arts 5(1) and 8(1) of the Federal Constitution — Whether there was deprivation of accused persons' rights, life or personal liberty — Whether issue of infringement of art 5(1) before trial started premature — Whether there was violation of accused persons' right to equality under art 8(1)

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There were two criminal appeals as the appellants were jointly tried at the High Court. Lim Guan Eng was charged for two offences under s 24 of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') and s 165 of the Penal Code, while Phang Li Koon was charged for an offence under s 109 read together with s 165 of the Penal Code. After the service of the documents under s 51A of the Criminal Procedure Code ('the CPC') by the prosecution on the defence was completed, the prosecution requested the appellants to comply with s 62 of the Act. The appellants then filed separate motions for a declaration that s 62 of the Act infringed arts 5(1) and 8(1) of the Federal Constitution ('the FC') and was therefore unconstitutional and void. The High Court judge ('the HCJ') found that: (a) as the appellants were never detained, there was no deprivation of their rights, life or personal liberty. Since the trial has yet to start, the issue of there being an infringement of art 5(1) before the trial started was premature; and (b) there was no violation of the appellants' right to equality guaranteed under art 8(1) since s 62 of the Act did not only apply to the appellants but also to anyone who was charged with an offence of corruption where such a person will also be subject to the same procedure, irrespective of position, colour, race and religion. Therefore, the HCJ concluded that s 62 of the Act was constitutional as it did not infringe arts 5(1) and 8(1) of the FC. The HCJ dismissed both motions and ordered both the appellants to file their respective defence statement within 14 days from 7 March 2017. Hence, the present appeals against these orders.

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Held, allowing the appeals and setting aside the orders of the High Court:

- (1) The prosecution was protected by s 51A(3) of the CPC in that a document shall not be inadmissible merely because of non-compliance of sub-s (1). However, there was no such equivalent provision in s 62 of the Act when it came to the rights of the appellants. As such, s 62 of the Act was in breach of arts 5(1) and 8(1) of the FC as it subjected the appellants, who were charged for offences under the Act, to an unfair and onerous burden which was not subjected to the prosecution. In other words, where the prosecution was able to bolster its case by tendering further evidence after the commencement of the trial by virtue of s 51A(3) of the CPC, the appellants were on the face of s 62 of the Act, precluded from tendering further evidence once the trial had commenced (see para 18). A
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- (2) Section 62 of the Act, when viewed together with the current s 51A of the CPC, discriminated unfairly and unreasonably against the appellants as compared to the prosecution. Section 62 of the Act was unconstitutional vis a vis arts 5(1) and 8(1) of the FC. This was further fortified when viewed from the principle of 'equality of arms' (see para 20). D

[Bahasa Malaysia summary]

Terdapat dua rayuan jenayah kerana perayu-perayu dibicarakan bersekali di Mahkamah Tinggi. Lim Guan Eng dipertuduh atas dua kesalahan di bawah s 24 Akta Suruhanjaya Pencegahan Rasuah 2009 ('Akta') dan s 165 Kanun Keseksaan, manakala Phang Li Koon dipertuduh atas kesalahan bawah s 109 dibaca bersama-sama dengan s 165 Kanun Keseksaan. Selepas lengkap penyerahan dokumen-dokumen di bawah s 51A Kanun Tatacara Jenayah ('KTJ') oleh pihak pendakwaan kepada pembelaan, pihak pendakwaan meminta perayu-perayu mematuhi s 62 Akta. Perayu-perayu kemudian memfailkan usul berasingan bagi deklarasi bahawa s 62 Akta mencabuli perkara 5(1) dan 8(1) Perlembagaan Persekutuan ('PP') dan dengan itu, tidak berperlembagaan dan tidak sah. Hakim Mahkamah Tinggi ('HMT') memutuskan: (a) oleh kerana perayu-perayu tidak pernah ditahan, tiada penafian hak-hak, kehidupan atau kebebasan peribadi mereka. Memandangkan perbicaraan belum bermula, isu berlakunya pencabulan perkara 5(1) sebelum perbicaraan adalah pramatang; dan (b) tiada pencabulan hak perayu-perayu terhadap kesamarataan yang dijamin di bawah perkara 8(1) kerana s 62 Akta tidak sahaja terpakai pada perayu-perayu tetapi juga siapa-siapa yang dipertuduh dengan kesalahan rasuah yang mana orang tersebut akan dikenakan prosedur yang sama, tanpa mengira kedudukan, warna kulit, bangsa atau agama. Oleh itu, HMT menyimpulkan bahawa s 62 Akta berperlembagaan kerana tidak melanggar perkara 5(1) dan 8(1) PP. Hakim Mahkamah Tinggi menolak kedua-dua usul dan memerintahkan kedua-dua perayu untuk memfailkan pernyataan pembelaan mereka dalam masa 14 hari dari 7 Mac 2017. Oleh itu, rayuan-rayuan terhadap perintah-perintah ini difailkan. E
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A **Diputuskan,** membenarkan rayuan-rayuan dan mengetepikan perintah-perintah Mahkamah Tinggi:

- B** (1) Pihak pendakwaan dilindungi oleh s 51A KTJ kerana satu-satu dokumen tidak menjadi tidak boleh diterima hanya kerana ketidakpatuhan sub-s (1). Walau bagaimanapun, tiada peruntukan sama dalam s 62 Akta tentang hak-hak perayu-perayu. Dengan itu, s 62 Akta melanggar perkara 5(1) dan 8(1) PP kerana mengenakan perayu-perayu, yang dipertuduh bagi kesalahan-kesalahan di bawah Akta, beban berat dan tidak adil yang tidak dikenakan pada pihak pendakwaan. Dalam kata lain, walaupun pihak pendakwaan boleh menyandarkan kesnya dengan mengemukakan keterangan lanjut selepas pemulaan perbicaraan di bawah s 51A KTJ, perayu-perayu, di bawah s 62 Akta, dikecualikan daripada mengemukakan keterangan lanjut apabila perbicaraan telah bermula (lihat perenggan 18).
- C**
- D** (2) Seksyen 62 Akta, apabila dibaca bersekali dengan s 51A KTJ semasa, secara tidak adil dan tidak munasabah mendiskriminasi perayu-perayu berbanding pihak pendakwaan. Seksyen 62 Akta adalah tidak berperlembagaan dalam hubungan perkara 5(1) dan 8(1) PP. Ini disokong selanjutnya apabila dilihat daripada prinsip 'equality of arms' (lihat perenggan 20).]
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Notes

For cases on personal liberty, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2765–2783.

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Cases referred to

- Alcontara all Ambros Anthony v PP* [1996] 1 MLJ 209, FC (refd)
- Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, FC (refd)
- Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, FC (refd)
- G** *Dato' Seri Anwar bin Ibrahim v PP* [2010] 2 MLJ 312, FC (refd)
- Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285, FC (refd)
- Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155, FC (refd)
- H** *Lee Kwan Woh v PP* [2009] 5 MLJ 301, FC (refd)
- Ooi Kean Thong & Anor v PP* [2006] 3 MLJ 389, FC (refd)
- PP v Gan Boon Aun* [2017] 3 MLJ 12; [2017] 4 CLJ 41, FC (refd)
- Pendakwa Raya v Zahiruddin bin Abdullah* [2012] MLJU 901; [2012] 5 LNS 8, Sc (refd)
- I** *Pendakwa Raya v Md Zaki Othman* (Criminal Appeal No W-09(H)-231-06/2016) (unreported) (refd)
- Pendakwa Raya v Noordin bin Sadakathullah dan 2 lagi* (Criminal Appeal No 42LB (A)-1-02/2014) (unreported) (refd)
- PP v Mohd Fazil bin Awaludin* [2009] 8 MLJ 579, HC (refd)

Teng Boon How v Pendakwa Raya [1993] 3 MLJ 553, SC (refd)

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Legislation referred to

Criminal Procedure and Investigation Act 1996 [UK]

Criminal Procedure Code ss 51A, 51A(1), (1)(b), (3), (4), (5), 180

Federal Constitution arts 5(1), 8(1)

Malaysian Anti-Corruption Commission Act 2009 ss 24, 62

Penal Code ss 109, 165

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Appeal from: Criminal Application Nos PA-44-3-01 of 2017 and P4-44-2-01 of 2017 (High Court, Penang)

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Gobind Singh Deo (RSN Rayer, Kulasegaran, Ramkarpal Singh and Joanne Chua Tsu Fae with him) (Gobind Singh Deo & Co) in Criminal Appeal No P-06A-7-03 of 2017 for the appellant.

V Sithambaram (Hisyam Teh Poh Teik and A Ruebankumar with him) (Sitham & Assoc) in Criminal Appeal No P-05-121-03 of 2017 for the appellant.

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Masri Mohd Daud (Abdul Rashid Daud, Budiman Lutfi Mohamad, Mohd Ashrof Adrin Kamarul and Mohd Zain Ibrahim) (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal Nos P-06A-7-03 of 2017 and P-05-121-03 of 2017 for the respondents.

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Umi Kalthum JCA:

INTRODUCTION:

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[1] There are two criminal appeals heard together by us. Appeal No P-06A-7-03 of 2017 was filed by Lim Guan Eng ('LGE') and Appeal No P-05-121-03 of 2017 was filed by Phang Li Koon ('PLK'). Both LGE and PLK ('the appellants/accused') had earlier respectively filed a motion to the High Court judge for:

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- (a) a declaration that s 62 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) ('the Act') is unconstitutional and void; and
- (b) in the alternative, that the applicant shall serve a defence statement before the commencement of the trial under s 62 of the Act.

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[2] The learned High Court judge heard both motions together and had dismissed both motions on 7 March 2017 and ordered both LGE and PLK to file their respective defence statement within 14 days from 7 March 2017. It is against these two orders that LGE and PLK are appealing against.

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A BACKGROUND FACTS

B [3] The background facts of the appeals can be gleaned from the grounds of judgment of the learned High Court judge as follows. On 30 June 2016, LGE was charged for two offences, namely under s 24 of the Act and s 165 of the Penal Code. **C** PLK was charged for an offence under s 109 read together with s 165 of the Penal Code. LGE and PLK were jointly tried. The trial of the cases were fixed for hearing on from 27 March 2017–31 March 2017, 10 April 2017–14 April 2017, 24 April 2017–28 April 2017, 15 May 2017–19 May 2017, 29 May 2017–16 June 2017 and 17 July 2017–21 July 2017. The service of the documents under s 51A of the Criminal Procedure Code ('the CPC') by the prosecution on the defence was completed on 15 December 2016. The prosecution then requested LGE and PLK to comply with s 62 of the Act. Both LGE and PLK then filed the motions separately.

D [4] Since both appellants, LGE and PLK, adopted each other's arguments, we would then approach these appeals as if they were argued as one appeal with such necessary modification if need be.

E AT THE HIGH COURT

[5] The issue before the High Court was whether s 62 of the Act has infringed arts 5(1) and 8(1) of the Federal Constitution ('the Constitution') and is therefore unconstitutional and void?

F [6] The appellants took the position that s 62 of the Act:

G (a) takes away the accused's right of silence and their privilege against self-incrimination guaranteed by the Constitution;

H (b) impedes a fair trial by requiring the defence to serve a defence statement and supporting evidentiary documents on the prosecution before the prosecution has proven a prima facie case;

(c) places the defence with unfair, onerous and impossible task to meet which is not subjected to accused for other criminal offences;

I (d) envisages that the accused cannot call any evidence for the defence that is not disclosed to the prosecution at the pre-trial stage;

(e) reverses the burden of proof which lies on the prosecution by compelling the accused to disclose their defence even before the prosecution has presented their case; and

(f) the requirement for the accused to file the defence statement is a power exercisable only by the judiciary.

[7] The learned High Court judge was of the view that s 62 of the Act was enacted for the purposes of: **A**

- (a) enabling the prosecution to investigate facts relied on by the defence;
- (b) expediting the trial of corruption cases;
- (c) minimising the risk of wrongful conviction or wrongful acquittal; and **B**
- (d) not depriving the personal liberty of the accused contrary to the law as guaranteed under art 5(1) of the Constitution nor to deny the accused equal protection of the law under art 8(1) of the Constitution. **C**

[8] The learned High Court judge found that as the accused were never detained, there was no deprivation of the accused's rights, life or personal liberty. Consequently, since the trial has yet to start, the issue of there being an infringement of art 5(1) before the trial starts is premature. **D**

[9] The learned High Court judge found there is no violation of the accused's right to equality guaranteed under art 8(1) since s 62 of the Act does not only apply to the accused but also to anyone who is charged with an offence of corruption where such a person will also be subject to the same procedure, irrespective of position, colour, race and religion. **E**

[10] Therefore, the learned judge concluded that s 62 of the Act is constitutional as it did not infringe arts 5(1) and 8(1) of the Constitution. She then proceeded to dismiss both motions and ordered the appellants/accused to file their defence statement within 14 days from the order. **F**

[11] We heard the appellants' appeal and allowed their appeals. We set aside the orders of the High Court dated 7 March 2017. We now give our reasons for doing so. **G**

THE APPEAL

[12] As the appellants are challenging the constitutionality of s 62 of the Act, vis a vis arts 5(1) and 8(1) of the Constitution, it is best to reproduce the same as follows: **H**

62 Defence statement

Once delivery of documents by the prosecution pursuant to section 51A of the Criminal Procedure Code has taken place, the accused shall, before commencement of the trial, deliver the following documents to the prosecution: **I**

- (a) a defence statement setting out in general terms the nature of the defence and the matters on which the accused takes issue with the prosecution, with reasons; and

- A** (b) a copy of any document which would be tendered as part of the evidence for the defence.
- 5 Liberty of the person
- (1) No person shall be deprived of his life or personal liberty save in accordance with law.
- B** 8 Equality
- (1) All persons are equal before the law and entitled to the equal protection of the law.
- C** [13] The Act, which also means s 62, came into force on 1 January 2009. Based on the statement made by the honourable minister when tabling the Malaysian Anti-Corruption Commission Bill 2008 (see para 27 below), s 62 was drafted in contemplation of s 51A of the CPC (before its amendment) in which the latter came into force on 7 September 2007. Section 62 requires the
- D** accused to deliver to the prosecution the following:
- (a) the accused's defence statement setting out in general terms the nature of the defence;
- E** (b) the matters on which the accused takes issue with the prosecution, with reasons; and
- (c) a copy of any document that would be tendered as part of the evidence for the defence.
- F** [14] It was contended by the appellants that since the appellants/accused are required to comply with s 62 before the commencement of the trial and before the prosecution commence their case, there is a reversal in the burden or standard of proof. Not only that, there is a displacement of the presumption of
- G** innocence of the accused before the prosecution prove their case against the accused. This will lead to an unjust trial.
- [15] Moreover, the appellants are not able to comply with the requirements of s 62 since the prosecution has not disclosed their entire case at that stage except to reveal some of the documents that would be tendered as part of the
- H** prosecution's evidence pursuant to s 51A(1)(b) of the CPC.
- [16] Since our decision turned on the provisions of s 51A of the CPC vis a vis s 62 of the Act, it behoved us to lay out the manner how s 51A was included
- I** into the CPC. Section 51A of the CPC was added to the CPC vide the Criminal Procedure Code (Amendment) Act 2006 (Act 1274) which came into force on 7 September 2007 (PU (B) 322/2007). It is as follows:
- 51A Delivery of certain documents

- (1) The prosecution shall before the commencement of the trial deliver to the accused the following documents: **A**
- (a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;
 - (b) a copy of any document which would be tendered as part of the evidence for the prosecution; and **B**
 - (c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution. **C**
- (2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

Subsequently, s 51A of the CPC was amended vide the Criminal Procedure Code (Amendment) Act 2012 (Act 1423) (which came into force on 1 June 2012 (PU (B) 190/2012)) which incorporated sub-ss (3)–(5). These inclusions allow for documents to be admissible even where there is non-compliance with sub-s (1) with certain conditions. The present s 51A is as follows: **D**

51A Delivery of certain documents

- (1) The prosecution shall before the commencement of the trial deliver to the accused the following documents: **E**
- (a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;
 - (b) a copy of any document which would be tendered as part of the evidence for the prosecution; and **F**
 - (c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution. **G**
- (2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.
- (3) A document shall not be inadmissible in evidence merely because of non-compliance with sub-section (1). **H**
- (4) The Court may exclude any document delivered after the commencement of the trial if it is shown that such delivery was so done deliberately and in bad faith.
- (5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused — **I**
- (a) a reasonable time to examine the document; and
 - (b) to recall or re-summon and examine any witness in
 - (c) relation to the document.

- A [17] The inclusion of sub-ss (3)–(5) of s 51A of the CPC was as a result of the Federal Court case of *Dato’ Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312, where it was held that s 51A of the CPC is mandatory; see per Abdull Hamid Embong FCJ (delivering judgment of the court) (as he then was) para 28, p 324:
- B [28] Section 51A of the CPC (A 1274/06) is new. It provides for a mandatory obligation on the part of the prosecution to supply to an accused person the first information report made under s 107 of the CPC, a copy of any document which would be part of the prosecution’s case and any statements of facts favourable to the defence, (with a safeguard on public interest consideration) ...
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- D [18] We agreed with the submission of the appellants that the prosecution is now protected by s 51A(3) of the CPC in that a document shall not be inadmissible merely because of non-compliance of sub-s (1), but that there is no such equivalent provision in s 62 of the Act when it comes to the rights of the accused/appellants. As such, we were in agreement with the appellants’ submission that s 62 of the Act is in breach of arts 5(1) and 8(1) of the Constitution as it subjects the appellants who are charged for offences under the Act to an unfair and onerous burden which is not subjected to the prosecution. In other words, where the prosecution is able to bolster its case by tendering further evidence after the commencement of the trial, by virtue of s 51A(3) of the CPC, the appellants/accused are on the face of s 62 of the Act, precluded from tendering further evidence once the trial has commenced.
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- F [19] We refer to the Federal Court case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 at pp 165–166, on how one should view discriminatory laws, where it was held that, per Suffian LP (as he then was):
- G Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:
- H (1) The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
- I (2) The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153.
- (3) The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words ‘public authority’ in cl (4) and ‘practice’ in cl (5)(b) of art 8.
- (4) The prohibition applies to both substantive and procedural law.
- (5) Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para (c)); residents in a particular State as opposed to residents elsewhere (para (d)); and Malays and natives of Borneo as opposed to others who are not (art 153).

(6) In India, the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.

With respect we would agree with the Solicitor General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

(7) In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia*, provided that:

- (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
- (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

The Solicitor General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the court should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. *In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in para 6 above. We adhere to what was said in Public Prosecutor v Khong Teng Khen at p 170:*

The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', Kedar Nath v State of West Bengal (AIR 1953 SC 404, 406).

In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another

- A *area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate Article 8. All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same*
- B *rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.*

- C As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification. (Emphasis added.)

- D [20] We therefore were of the view that s 62 of the Act when viewed together with the current s 51A of the CPC has discriminated unfairly and unreasonably against the appellants/accused as compared to the prosecution. We would therefore strike down s 62 of the Act as being unconstitutional vis a vis arts 5(1) and 8(1) of the Constitution.

- E [21] We were fortified in our finding when viewed from the principle of ‘equality of arms’. This principle was considered in the High Court case of *Public Prosecutor v Mohd Fazil bin Awaludin* [2009] 8 MLJ 579 and which was approved by the Federal Court in *Dato’ Seri Anwar bin Ibrahim* at para 12, pp 587–588, as follows:

- F [12] In *Jarrold Rags v Magistrates’ Court of Victoria* (2008) VCS 1 the Supreme Court of Victoria discussed the principle of ‘equality of arms’ in the following manner:

- G [45] The Criminal trial is ‘an accusatory and adversarial process’. The person accused is presumed to be innocent and does not have to prove or say anything. The prosecution is the accuser and, from the first to the last, carries the onus proving each element of the offence according to the criminal standard beyond reasonable doubt. The rationale is that the general objectives of the criminal justice system — finding the truth and attributing criminal responsibility — are best achieved by a trial conducted before an independent and impartial judge, or judge and jury, in which both sides participate according to their best interests. A number of important rules of law and practice apply to regulate and moderate the adversarial nature of such a trial, but it has the appearance, and often the reality, of a ritual battle. *Equality of arms is an international human rights principle that picks up the language of the battle to explain some aspects of the most important of those rules — the right to a fair trial.*

- H [46] This is the equality of arms principle, which applies to both civil and criminal trials, as stated by the European Court of Human Rights in *Foucher v France*:

The court reiterates ... *that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case on condition that do not*

place him at a disadvantaged vis a vis his opponent.

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[47] Here is the most elaborate statement of the principle given by Stefania Negri in the *International Criminal Law Review*, which also emphasises it is one of comprehensive application:

The right to a fair trial entails protecting the 'equality of arms' principle, an inherent element of the due process of law in both civil and criminal proceedings. Strict compliance with this principle is required at all stages of the proceedings in order to afford both parties (especially the weaker litigant) a reasonable opportunity to present their case under conditions of equality. Indeed, at the core of the concept of 'equality of arms' as elaborated in domestic and international case law, is the idea that both parties should be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial. Fundamental procedural safeguards aimed at securing such equality are guaranteed in most domestic legal orders, enshrined in human rights treaties and other relevant international instruments, and set out in the Statute and Rules of the major international courts and tribunals.

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[48] The equality of arms principle — which was probably taken from the civil law tradition n22 — was originally stated by the European Court of Human Rights set up under the European Convention on Human Rights. The European Convention — to use its abbreviated name — was entered into in 1950 in the aftermath of the Second World War. Articles 6(1) and (3) contain provisions relating to equal right to a fair trial before an independent and impartial court or tribunal that are of fundamental importance. The provisions came from the common law and civil legal traditions of those civilised countries that respected and followed the principle of a fair trial and the rules necessary to produce one ...

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[22] In *Dato' Seri Anwar bin Ibrahim*, the Federal Court reiterated the principles of a right to a fair trial and the 'equality of arms' at p 331, paras 49–50, as follows:

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[49] At the close of arguments, learned assisting counsel for the appellant, Dato Param Kumaraswamy, called our attention to a document called the 'General Comment No 32 of the UN Human Rights Committee, 19th Sessions'. We were reminded of the rights to equality before the courts and to a person's right to a fair trial. One feature found in that document is the provision on 'adequate facilities' to be given to an accused person. This includes access to documents and other evidence, including materials that the prosecution *plans to offer in court against the accused* (see para 33).

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[50] *The right to a fair trial is of course a universal principle. It is inviolable. It has since been fully developed in the common law practice including here, in Malaysia. This was emphasised very recently in our High Court through the words of Mohd Zawawi JC in Public Prosecutor v Mohd Fazil bin Awaludin* [2009] 7 MLJ 741 at p 747, *which we wholly approve*. The learned JC said this:

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The principle of a fair trial is sacrosanct in all civilised legal jurisdiction. It is a principle of universal application. In Malaysia the principle of fair trial and

A fairness have been long established and recognised in several decisions. Some of these include *Cheak Yoke Thong v Public Prosecutor* [1984] 1 MLJ 311 and *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810 ... (Emphasis added.)

B [23] At this juncture, it is pertinent for us to raise the complaint by the appellants in their submissions that the prosecution have been utilising s 62 of the Act to deny the accused a fair trial. The appellants have cited three examples and they are:

C (a) *Pendakwa Raya v Zahiruddin bin Abdullah* [2012] MLJU 901; [2012] 5 LNS 8;

(b) *Pendakwa Raya v Noordin bin Sadakathullah dan 2 lagi* (Criminal Appeal No 42LB (A)-1-02/2014) (unreported); and

D (c) *Pendakwa Raya v Md Zaki Othman* (Criminal Appeal No W-09(H)-231-06/2016) (unreported).

E [24] In *Pendakwa Raya v Zahiruddin bin Abdullah*, the prosecution had not objected to the admissibility of two agreements D30 and D31 at the trial but raised objection at the submission stage by resorting to s 62 of the Act. The objection was sustained by the learned sessions court judge who, in rejecting the admissibility of the said evidence, held as follows, at para 14:

F [14] Berhubung pengemukaan D30 dan D31 yang dikatakan dokumen perjanjian berkenaan perkara ini di antara OKT dan SP15, semasa perbicaraan, pihak pendakwaan tidak membantah pengemukaan dokumen-dokumen tersebut sebagai ekshibit pembelaan. Walau bagaimanapun, di dalam hujahan isu D30 dan D31 ini telah dicabar oleh pihak pendakwaan kerana pengemukaan dokumen-dokumen tersebut sebagai dokumen pembelaan ketika perbicaraan adalah bertentangan dengan peruntukan di bawah s 62(a) dan (b) Akta SPRM 2009 yang mengkehendaki pihak pembelaan untuk mengemukakan salinan dokumen yang akan dikemukakan sebagai keterangan bagi pembelaan sebelum permulaan perbicaraan. Di sini, mahkamah bersetuju dengan hujahan pendakwaan bahawa pengemukaan D30 dan D31 ketika perbicaraan tersebut tidak mematuhi peruntukan di bawah s 62(a) dan (b) Akta SPRM 2009 tersebut.

H [25] In *Pendakwa Raya v Noordin bin Sadakathullah dan 2 lagi*, the prosecution had relied on s 62 of the Act to preclude the respondents/accused persons from relying on an exhibit which was not disclosed under s 62. The prosecution made the following submissions in the appeal before the High Court at Shah Alam:

I 28. Seterusnya, perayu juga berhujah bahawa kegagalan pihak responden-responden mengemukakan D14 sebelum bermulanya perbicaraan yang merupakan bukti yang telah digunakan oleh responden-responden telah menjejaskan pembelaan responden-responden gagal kerana responden-responden

- telah tidak mematuhi s 62 ASPRM 2009. A
- ...
32. Oleh itu, diujahkan di sini bahawa apabila pihak responden-responden telah gagal mengemukakan D14 seawal sebelum perbicaraan bermula lagi dan tambahan lagi hanya di peringkat kes pembelaan barulah responden-responden mengemukakan D14, ini jelas menunjukkan responden-responden telah tidak mematuhi s 62 ASPRM dan seterusnya D14 tidak boleh diambil kira sebagai satu bukti kukuh untuk menyokong pembelaan responden-responden terutamanya responden pertama. B
- We were informed by the appellants' counsel that recently the High Court at Shah Alam in the above case had upheld the submissions of the prosecution on s 62 of the Act and reversed the decision of the sessions court and convicted the respondents/accused persons. C
- [26] The notes of proceeding of the case at the sessions court in *Pendakwa Raya v Md Zaki Othman* were tendered in court as further illustration of the problem faced by accused persons in not complying with s 62 of the Act. Here again, the learned deputy public prosecutor ("DPP") had objected to the tendering of the original police report made by the defence witness at the defence stage for being in contravention of s 62 of the Act. The learned sessions court judge had accepted the learned DPP's objection. D E
- [27] The learned DPP, in his submission, had generally supported the decision of the learned High Court judge in these appeals. He drew our attention to the *Hansard* of the house of representatives dated 15 December 2008 where the honourable minister had tabled the Malaysian Anti-Corruption Commission Bill 2008 for the second and third readings. With regards to the provision of s 62 of the Act, this is what the honourable minister had to say: F
- Bagi mengimbangi peruntukan s 51A, Kanun Tatacara Jenayah di mana pihak pendakwaan perlu membekalkan penyertaan kepada pihak pembelaan. Fasal 62 rang undang-undang ini telah memperuntukkan supaya pihak pembelaan juga membekalkan penyertaan tentang pembelaan mereka dan saingan mana-mana dokumen yang akan dikemukakan semasa perbicaraan kepada pihak pendakwaan. G
- Fasal 62 ini adalah bagi memastikan keadilan terlaksana bukan sahaja terhadap pihak tertuduh tetapi juga kepada pihak yang membuat aduan. Fasal ini merupakan satu-satunya peruntukan yang terdapat dalam mana-mana undang-undang bertulis pada ketika ini. H
- Tuan Yang di-Pertua, langkah kerajaan mencadangkan Rang Undang-undang Suruhanjaya Pencegahan Rasuah 2008 ini jelas membuktikan kesungguhan dan iltizam berterusan kerajaan, *political will* dengan izin bagi memerangi jenayah rasuah yang semakin *sophisticated* dan *complicated* dengan izin yang kini telah merentas sempadan ekoran dari perkembangan teknologi maklumat yang semakin maju dan pantas. Telah banyak berlaku perubahan dalam tempoh sedekad yang lalu I

A dan kini sudah tiba masanya undang-undang yang sedia ada itu diberi nafas baru bagi memastikan pelaksanaan penguatkuasaannya lebih berkesan bersesuaian dengan keadaan masa kini.

B [28] From the statement of the honourable minister, we could see clearly the link between s 51A of the CPC and that of s 62 of the Act, before the amendment made to s 51A of the CPC. Thus, what began as an intention to equalise the need for the accused to provide a defence statement to the prosecution, which prosecution, by virtue of the unamended s 51A of the CPC, had to provide a statement to the accused/defence before commencement of the trial, has now dramatically changed with the amendment of s 51A of the CPC without similar amendment to s 62 of the Act. The similar non-amendment of s 62 of the Act had led us to conclude that there now arise a situation of an ‘inequality of arms’ acting against the interest of the appellants/accused.

D [29] The learned DPP had endeavoured to persuade us to accept his personal assurances that s 62 of the Act will be interpreted by him and his colleagues so as to allow any accused persons to file/adduce further documents/evidence even after the trial has commenced in any particular case. According to his reading of s 62, that section does not take away the accused’s right to adduce further evidence in pursuit of his/her defence. The first problem we had against the learned DPP’s assurances was that, contrary to his assurances, his colleagues in the sessions court had seen it fit to object to the said court’s reception of the ‘new’ evidence adduced by the defence after the commencement of the trial, and which objection was accepted by the court, as seen in the examples of cases referred to by the appellants’ counsel. Secondly, the learned DPP’s interpretation of s 62 of the Act is not expressly provided for in that section itself. What is not expressly provided for must necessarily be excluded. Thirdly, in view of the need to expressly amend s 51A of the CPC to enable the prosecution to adduce further documents after the commencement of the trial, it can easily be argued that until and unless s 62 is similarly expressly amended, the accused is precluded from adducing any further document/evidence after the commencement of the trial. In view of these concerns, we, with respect, were not able to accept the learned DPP’s reassurances.

G [30] The appellants further submitted that s 62 of the Act infringes on the appellants’ right against self-incrimination and the right to remain silent based on case law such as *Alcontara all Ambros Anthony v Public Prosecutor* [1996] 1 MLJ 209 (FC), *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553 (SC), *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; [2017] 4 CLJ 41 (FC). We do not believe that s 62 of the Act goes that far as to overturn one of the basic principles pertaining to criminal law in this country without more. After all, the requirements of s 180 of the CPC (procedure after conclusion of case

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for prosecution) requiring the prosecution to prove the case against the accused on a prima facie basis before the defence is called is still the cornerstone of our criminal law and s 62 of the Act does not affect the implementation of s 180 of the CPC at all. It must be remembered that the challenge to s 62 of the Act came about as a result of the amendment to s 51A of the CPC, thus changing the balance between the prosecution's duty to provide the documents etc. to the defence under the unamended s 51A of the CPC and the accused's duty to provide the prosecution with the defence statement and documents under s 62.

[31] We found that one of the learned High Court judge's grounds for dismissing the motions by comparing s 62 of the Act with that of the United Kingdom (UK) Criminal Procedure and Investigation Act 1996 as being of little help. This is because, unlike Malaysia, the UK does not have a written constitution. So where in Malaysia we subscribe to the concept of constitutional supremacy, the UK legal system is premised on the concept of parliamentary supremacy. We therefore agreed with the appellants' submission that, in Malaysia, any provision of law which has the effect of infringing any fundamental right guaranteed by the Constitution would entail the courts of this country to examine and declare the same as unconstitutional whenever the need arises.

[32] We were very conscious of the fact that our decision on the unconstitutionality of s 62 of the Act was a weighty one. We had taken into account all the principles of law pertaining to the interpretation of the Constitution and statute law such as *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389 (FC) (on the presumption of constitutionality in favour of impugned statutory provision); *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285 (FC); *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (FC); *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 (FC); and *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 (FC). But in view of our reasons as laid out above, we came to the conclusion that s 62 of the Act is untenable in view of the 'inequality of arms' provisions of s 51A of the CPC and we proceeded to strike s 62 down as being unconstitutional.

CONCLUSION

[33] For the reasons adumbrated above, we allowed the appeals of the appellants and the orders of the High Court dated 7 March 2017 were set aside. We found that s 62 of the Act read together with the amended s 51A of the CPC is ultra vires art 5(1) read together with art 8(1) of the Constitution and therefore s 62 of the Act is of no effect.

A ALTERNATIVE SUBMISSION

B [34] The appellants' alternative submission, in the event this court was not with them on the first issue, was to pray for this court to overturn the learned High Court judge's orders for the appellants to serve their defence statement within 14 days from her decision on 7 March 2017.

C [35] In their submissions, both appellants submitted that s 62 of the Act merely requires the accused to file the defence statement 'before the commencement of the trial'. As there is no time frame prescribed under s 62, it was wrong for the learned judge to have fixed a specific time frame of 14 days from the date of her decision for the accused to deliver their defence statement to the prosecution.

D [36] We agreed with the submission of the learned counsels for the appellants on this issue. Section 62 clearly did not prescribe any period of time for the appellants to file their defence statement other than to provide that it has to be done 'before the commencement of the trial'.

E [37] If our decision on the constitutionality of s 62 of the Act is found to be wrong, we would still allow the appellants' appeal in part and allow the appellants' alternative prayer in the motions for the appellants to serve the defence statement before the commencement of the trial. The High Court orders of 7 March 2017 would to that extent be set aside by us.

F *Appeal allowed and High Court order set aside.*

Reported by Afiq Mohamad Noor

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